

Message Text

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ORIGIN EB-08

INFO OCT-01 ARA-10 ISO-00 OPIC-03 L-03 TRSE-00 DOE-15
SOE-02 COME-00 CIAE-00 INR-10 NSAE-00 INT-05
INRE-00 SSO-00 H-01 SP-02 SS-15 NSCE-00 OMB-01
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DRAFTED BY /EB:K S GUDGEON
APPROVED BY EB/IFD/OIA:M P BOERNER
OPIC:C HUNT
OPIC:B T MANSBACH
L/ARA:F ARMSTRONG
ARA/CAR:G DE SANTILLANA
L:L R MARKS
TREASURY:R GOODMAN (INFO)
-----028698 231342Z /40
O 231325Z JUN 78
FM SECSTATE WASHDC
TO AMEMBASSY SANTO DOMINGO IMMEDIATE

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E.O. 11652: N/A

AGS: EINV

SUBJECT: EASTERN PETROLEUM OPIC CASE

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1. OPIC HAS PENDING AN APPLICATION FOR INSURANCE BY
EASTERN PETROLEUM COMPANY WITH RESPECT TO ITS INVESTMENT
IN A PETROLEUM EXPLORATION AND DEVELOPMENT PROJECT IN THE
DOMINICAN REPUBLIC. EASTERN PETROLEUM, ITS WHOLLY-OWNED
DOMINICAN SUBSIDIARY (EASTERN PETROLEUM, DOMINICANA S.A.),
AND A CANADIAN COMPANY HAVE ENTERED INTO A PRODUCTION
SHARING AGREEMENT WITH THE GOVERNMENT OF THE DOMINICAN
REPUBLIC (GODR) WHICH CONTAINS THE FOLLOWING PROVISIONS
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AT ARTICLE 36: QUOTE ANY DISPUTE ARISING BETWEEN THE
CONTRACTOR AND THE STATE CONCERNING THE INTERPRETATION OR
EXECUTION OF THIS CONTRACT AND WHICH CANNOT BE SETTLED
BY MUTUAL AGREEMENT SHALL BE SUBMITTED EXCLUSIVELY TO
THE JURISDICTION OF THE COURTS OF THE DOMINICAN REPUBLIC,
THE CONTRACTOR TACITLY WAIVING ANY FORM OF DIPLOMATIC
INTERVENTION. END QUOTE.

2. THE APPEARANCE OF SUCH A PROVISION, IN ESSENCE A CALVO CLAUSE, IN A CONTRACT BETWEEN AN INVESTOR AND THE HOST GOVERNMENT PRESENTS US WITH AN UNWELCOME PRECEDENT. THE POLICY AND LEGAL IMPLICATIONS OF PROCEEDING IN THE FACE OF THE PROVISION, WITHOUT TAKING STEPS TO PRESERVE

U.S. INTERESTS, HAVE BEEN CAREFULLY REVIEWED. CONCERN HAS FOCUSED NOT SO MUCH ON ANY QUESTION REGARDING THE U.S. RIGHT TO 'INTERVENE' BY SUCCESSION OF INTEREST IN ACCORDANCE WITH THE 1962 BILATERAL ON INVESTMENT GUARANTY, SINCE THE GODR HAS GIVEN ITS APPROVAL TO THE PROJECT WITHIN THE FRAMEWORK OF THAT AGREEMENT, BUT ON TWO OTHER ELEMENTS. FIRST, THE ARBITRATION PROVISIONS OF THE BILATERAL ARE SILENT AS TO CHOICE OF LAW, AND NO REFERENCE TO THE ROLE OF INTERNATIONAL LAW IS MADE. THE EXISTENCE OF THIS CONTRACT WITH ITS IMPLIED CHOICE OF DOMINICAN LAW IN ARTICLE 36 TO DEFINE THE RIGHTS OF THE INVESTOR, THE SAME RIGHTS TO WHICH THE USG MIGHT BECOME SUBROGATED UNDER THE 1962 AGREEMENT, COULD CLOUD SUCCESSFUL U.S. RELIANCE ON ITS RIGHTS UNDER INTERNATIONAL LAW IN ANY NEGOTIATIONS OR ARBITRATION. IN OTHER WORDS, EITHER ON A THEORY OF STRICT SUCCESSION OF INTEREST TO THE RIGHTS OF THE INSURED, OR ON A THEORY OF IMPLIED WAIVER, IT MIGHT BE ARGUED THAT THE U.S. HAS ACCEPTED THAT ITS OWN RIGHTS IN TURN SHOULD ALSO BE DETERMINED UNDER LIMITED OFFICIAL USE

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GODR LAW TO THE EXCLUSION OF INTERNATIONAL LAW. ALTHOUGH OPIC AS SUBROGEE WOULD BE GOVERNED BY THE CHOICE OF LAW APPLICABLE TO THE INSURED WE SEEK TO AVOID IMPAIRING THE U.S. POSITION THAT THE APPLICATION OF LOCAL LAW IS SUBJECT TO INTERNATIONAL MINIMUM STANDARDS, AND THAT THE U.S. CAN HAVE OTHER INTERNATIONAL LAW RIGHTS AS SOVEREIGN WHICH ARE NOT SUBROGATED TO IT AND ARE NOT AFFECTED BY THE INVESTOR'S SUBMISSION TO LOCAL LAW. SECONDLY, IN LIGHT OF THE FACT THAT ALL PERTINENT DOCUMENTS WILL BE IN THE PUBLIC RECORD, THE FAILURE OF THE U.S. TO TAKE EXCEPTION TO ARTICLE 36 COULD BE MISINTER-

PRETED AS IMPLYING A CHANGE IN TRADITIONAL U.S. INVESTMENT AND CALVO POLICY, WITH POSSIBLE ADVERSE EFFECTS IN AREAS BEYOND OPIC INSURANCE (E.G., OUR FORTHCOMING BILATERAL INVESTMENT TREATY PROGRAM OR THE TNC CODE OF CONDUCT DISCUSSIONS.

3. STATE AND OPIC HAVE AGREED TO SEEK AN EXCHANGE OF NOTES WITH THE GODR WHICH WOULD ACCOMPLISH TWO THINGS: A LEGALLY EFFECTIVE CLARIFICATION OF U.S. RIGHTS UNDER THE BILATERAL, AND A STATEMENT WE CAN POINT TO FOR THE

RECORD TO REFUTE ANY FUTURE ASSERTION THAT THE U.S. HAS CHANGED ITS POSTURE ON CALVO ISSUES. A DRAFT OF SUCH AN EXCHANGE FOLLOWS AT PARAS 4 AND 5. IT IS INTENDED TO MAKE A BLANKET RESERVATION, AVOIDING UNNECESSARY REPETITION OF THIS ISSUE IN ANY FUTURE, SIMILAR CASES (SEE THE ATTACHED TEXT IN LAST PARA OF U.S. NOTE); THIS ELEMENT WHILE DESIRABLE, COULD BE DROPPED IF DIFFICULT TO NEGOTIATE. WE HAVE ALSO BRACKETED ALTERNATIVE CLOSINGS

FOR THE MIDDLE PARAGRAPH; THE HELPFUL REFERENCE TO INTERNATIONAL LAW, COUPLED WITH THE OPTIMUM VERSION OF THE FINAL PARA OF THE NOTE, WOULD EFFECTIVELY AMEND THE 1962 BILATERAL, AND OUR PREFERENCE IF YOU CONSIDER IT NEGOTIABLE IN LIGHT OF GODR INVESTMENT ATTITUDES. WE HAVE ALSO LIMITED OFFICIAL USE

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AGREED THAT IF AN EFFECTIVE EXCHANGE OF NOTES ALONG THESE LINES IS NOT NEGOTIABLE, THAT WE COULD FALL BACK TO A UNILATERAL EXPRESSION OF SIMILAR VIEWS IN A NOTE, ON THE UNDERSTANDING THAT THE GODR WOULD NOT CONTRADICT THEM IN REPLY. WE STRONGLY PREFER, HOWEVER, NOT TO HAVE TO RESORT TO THIS FALLBACK, AND WOULD NOT WANT IT PUT FORWARD BEFORE WE HAD A CHANCE TO EVALUATE GODR RESPONSE TO THE NOTE EXCHANGE PROPOSAL. HOPEFULLY, THE FAVORABLE PROSPECTS CITED IN ECON COUNSELOR'S APRIL 11 LETTER TO ARA/CAR STILL APPLY. FINALLY, SHOULD EITHER OF THESE APPROACHES NOT WORK OUT, OPIC WILL NOT INSURE IN THIS CASE. WE WOULD WELCOME EMBASSY COMMENTS ON IMPLEMENTING THIS STRATEGY IN LIGHT OF CURRENT DEVELOPMENTS AND ON THE FOLLOWING PROPOSED TEXT.

4. BEGIN TEXT OF U.S. NOTE: I HAVE THE HONOR TO REFER TO A CONTRACT FOR PETROLEUM SERVICES IN THE DOMINICAN REPUBLIC CONCLUDED BETWEEN THE GOVERNMENT OF THE DOMINICAN REPUBLIC, AND CERTAIN COMPANIES INCLUDING THE EASTERN PETROLEUM COMPANY, A COMPANY ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES, AND ITS WHOLLY-OWNED DOMINICAN SUBSIDIARY, EASTERN PETROLEUM DOMINICANA, S.A. EASTERN PETROLEUM COMPANY HAS APPLIED FOR A UNITED STATES GOVERNMENT GUARANTY OF ITS INVESTMENT IN THE DOMINICAN REPUBLIC.

IN CONFORMITY WITH THE CONDITION FOUND IN PARAGRAPH 2 OF THE 1962 AGREEMENT BETWEEN OUR TWO COUNTRIES RELATING TO INVESTMENT GUARANTIES, EASTERN PETROLEUM REQUESTED AND RECEIVED THE APPROVAL BY THE GOVERNMENT OF THE DOMINICAN REPUBLIC OF THE ISSUANCE OF SUCH A GUARANTY.

(NEW PARA) MY GOVERNMENT UNDERSTANDS SUCH APPROVAL TO CONSTITUTE THE AGREEMENT OF YOUR GOVERNMENT THAT THE LIMITED OFFICIAL USE

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GUARANTY, IF GIVEN, SHALL COME WITHIN THE TERMS OF THE 1962 AGREEMENT IN ALL RESPECTS, AND THAT NOTHING IN THE CONTRACT FOR PETROLEUM SERVICES, IN PARTICULAR ARTICLE 36 THEREOF, SHALL IMPAIR THE RIGHTS OF EITHER GOVERNMENT UNDER THE SAID AGREEMENT, INCLUDING THE RIGHT TO BINDING INTERNATIONAL ARBITRATION OF UNSETTLED CLAIMS (BEGIN BRACKET) OR CHOICE OF LAW THEREFOR. (END BRACKET). BEGIN BRACKET) UNDER THE APPLICABLE RULES AND PRINCIPLES OF INTERNATIONAL LAW. (END BRACKET).

(NEW PARA) IF THIS IS ALSO THE UNDERSTANDING OF YOUR GOVERNMENT, I HAVE THE HONOR TO PROPOSE THAT THIS NOTE, TOGETHER WITH YOUR REPLY TO THAT EFFECT, SHALL CONSTITUTE AN AGREEMENT BETWEEN OUR TWO GOVERNMENTS WITH RESPECT TO THE EFFECT OF APPROVAL BY YOUR GOVERNMENT OF THIS PROJECT (BEGIN BRACKET), AND FUTURE PROJECTS GOVERNED BY SIMILAR CONTRACTUAL PROVISIONS,) END BRACKET) UNDER THE 1962 AGREEMENT. THIS AGREEMENT SHALL BECOME EFFECTIVE ON THE DATE OF YOUR REPLY. END TEXT.

5. BEGIN TEXT OF REPLY NOTE: I HAVE THE HONOR TO REFER TO YOUR NOTE OF (INSERT DATE) WHICH STATES AS FOLLOWS: (QUOTE U.S. NOTE)

(NEW PARA) I HAVE THE HONOR TO CONFIRM THE UNDERSTANDING OF YOUR GOVERNMENT REGARDING THE EFFECT OF MY GOVERNMENT'S APPROVAL OF THE PROJECT, AND TO CONCUR IN YOUR PROPOSAL THAT YOUR NOTE, TOGETHER WITH THIS REPLY, SHALL CONSTITUTE AN AGREEMENT BETWEEN OUR GOVERNMENTS, EFFECTIVE THIS DAY. END TEXT. VANCE

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Message Attributes

Automatic Decaptioning: X
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Channel Indicators: n/a
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Concepts: INSURANCE, PETROLEUM, EXPLORATION, INVESTMENTS
Control Number: n/a
Copy: SINGLE
Draft Date: 23 jun 1978
Decaption Date: 01 jan 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 20 Mar 2014
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1978STATE160134
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Document Unique ID: 00
Drafter: K S GUDGEON
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Expiration:
Film Number: D780262-0381
Format: TEL
From: STATE
Handling Restrictions: n/a
Image Path:
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Legacy Key: link1978/newtext/t19780625/aaaaavjp.tel
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Review Event:
Review Exemptions: n/a
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Review Release Date: N/A
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SAS ID: 2224837
Secure: OPEN
Status: NATIVE
Subject: EASTERN PETROLEUM OPIC CASE -
TAGS: EINV, ENRG, DR, OPIC, EASTERN PETROLEUM CO
To: SANTO DOMINGO
Type: TE
vdkgvwkey: odb://SAS/SAS.dbo.SAS_Docs/0f72a182-c288-dd11-92da-001cc4696bcc
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